

THE PROPOSED AFFIRMATIVE DEFENSES OF FORCED PERPETRATION, ENTRAPMENT, INTOXICATION AND INSANITY

I. INTRODUCTION

The Proposed Ohio Criminal Code, in both its original form as introduced in the Ohio House of Representatives¹ and in its substitute form as finally passed by the House,² would codify forced perpetration (duress, necessity, and obedience to military orders), entrapment, intoxication and insanity as affirmative defenses. These four affirmative defenses, in both their original and substitute forms, represent the subject matter of this comment. The fundamental approach will be to separately analyze each defense in both forms with a view toward understanding what practical effect each form would have. This analysis will also include a critical evaluation of the defenses, and suggestions for improvements in those areas where improvement is thought to be needed. For the convenience of the reader, at or near the beginning of each discussion the texts of the original and substitute forms of the proposed defense will be set out.

This comment is not an attempt to thoroughly discuss the historical development of each defense, complete with an extensive examination of competing theories underlying the foundation of each defense. However, brief background sketches of the defenses are provided. Neither is this an exercise in comparative legal analysis. Such attempts and exercises have been done by others in the areas of these four defenses.³ Generally, the thrust of this comment is aimed directly at the legislative process.

¹ Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE (1971) [hereinafter cited as PROP. OHIO CRIM. CODE]. The text of the proposed legislation is incorporated in HOUSE BILL NUMBER 511, 109th Ohio General Assembly (1971) [hereinafter cited as H.B. NO. 511].

² PROP. OHIO CRIM. CODE as amended in SUBSTITUTE HOUSE BILL NUMBER 511, 109th Ohio General Assembly [hereinafter cited as SUB. H.B. NO. 511].

³ Forced Perpetration: Hersey, *Compulsion as a Defense to Criminal Prosecution*, 11 OKLA. L. REV. 283 (1958); Note, *Necessity as a Defense in Criminal Cases*, 33 DICK. L. REV. 138 (1929); Note, *Criminal Law—Contempt for Refusal to Answer—Duress as a Defense*, 33 TUL. L. REV. 237 (1958).

Entrapment: DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 SAN. FRAN. L. REV. 243 (1967); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942); Watt, *The Defense of Entrapment*, 13 CRIM. L.Q. 313 (1971); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORD. L. REV. 399 (1959).

Intoxication: Hutt, *Criminal Responsibility and the Right to Treatment for Intoxication and Alcoholism*, 57 GEO. L.J. 835 (1969); Merrill, *Drunkenness and Reform of the Criminal Law*, 54 VA. L. REV. 1135 (1968); Reinert, *Alcoholism: Disease or Habit?*, 32 FED. PROB. 12 (1968); Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S. CAR. L. REV. 349 (1967); Tao, *Alcoholism As a Defense to Crime*, 45 NOTRE DAME LAW. 68 (1969).

Insanity: Brady, *Abolish the Insanity Defense?—No!*, 8 HOUS. L. REV. 629 (1971); Lewinstein, *The Historical Development of Insanity as a Defense in Criminal Actions*, 14 J. FOR. SCI. 275 (1969); Comment, *Criminal Law—Rehabilitation, a Thesis; Punishment, the Anti-thesis—Insanity Defense in the Balance*, 19 DEPAUL L. REV. 140 (1969); Note, *Criminal Law—The A.L.I. Model Penal Code Insanity Test*, 44 TUL. L. REV. 192 (1969).

II. FORCED PERPETRATION

There are three separate affirmative defenses included within the proposed Ohio Revised Code § 2901.32: duress, necessity and obedience to military orders.

A. *Duress*

The original proposal:

Sec. 2901.32. (A) It is an affirmative defense to a criminal charge that the actor was intimidated into committing the offense by force or the threat of force against himself or another, which force or threat was such that a person of ordinary resolution could not have resisted it under the circumstances. A married woman is not entitled, by reason of the presence of her husband, to any presumption of intimidation.⁴

The substitute proposal:

Sec. 2901.32. (A) It is an affirmative defense to a criminal charge other than a charge of which the death of another is an element, that the actor was intimidated into committing the offense by force or the threat of force against himself or another, which force or threat was such that a person of ordinary resolution could not have resisted it under the circumstances. A married woman is not entitled, by reason of the presence of her husband, to any presumption of intimidation.⁵

Although the defense of duress must be defined by statute or by judicial enunciation, the meaning of duress is suggested by a standard English language dictionary:

[C]ompulsion . . . by which a person is . . . forced to do or forbear some act by actual imprisonment or physical violence to the person or by threat of such violence. . . .⁶

At common law, generally duress was a defense to all crimes with the exception of homicide.⁷ Other conditions were also imposed on the use of duress as a defense. For example, the duress had to be "present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury. . . ."⁸ In addition, it had to be directed at the life of the individual claiming the defense.⁹

In its original form,¹⁰ the proposed affirmative defense of duress would have modified the common law in two significant ways. First, it would

⁴ PROP. OHIO CRIM. CODE § 2901.32(A).

⁵ PROP. OHIO CRIM. CODE § 2901.32(A) (as amended in SUB. H.B. No. 511).

⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 703 (1961).

⁷ *Moore v. State*, 23 Ala. App. 432, 127 So. 796 (1929), *cert. denied*, 221 Ala. 50, 127 So. 797 (1930); *Nall v. Commonwealth*, 208 Ky. 700, 271 S.W. 1059 (1925).

⁸ *State v. St. Clair*, 262 S.W.2d 25, 27 (Sup. Ct. Mo. 1953).

⁹ *R. I. Recreation Center, Inc. v. Aetna Casualty and Surety Co.*, 177 F.2d 603 (1st Cir. 1949).

¹⁰ PROP. OHIO CRIM. CODE § 2901.32(A).

have applied the defense to all offenses. Secondly, it would have permitted the duress to be directed toward persons other than the defendant claiming the defense. Additionally, the original proposal would have modified the common law by not requiring, in all cases, that the threat be death or serious bodily injury. The original proposal simply stated that the defense is established if "the actor was intimidated into committing the offense by force or the threat of force against himself . . . such that a person of ordinary resolution could not have resisted it under the circumstances."¹¹ Consequently, the force or threat of force sufficient to invoke the defense could be directed at property, which was not true under the common law. In its original form, the defense was substantially similar to that suggested by the Model Penal Code.¹²

The substitute version of the defense¹³ would do little more than codify the common law defense of duress. While it would permit the duress to be directed toward persons other than the actor of the offense, it would allow the defense to be asserted only against offenses that do not have the death of another as an element. It is evident by the changes reflected in the substitute version that the House appears to view the scope of the defense as the main concern. It is also evident by the changes that the House appears disinclined to accept a substantial departure from the common law. Such reluctance to depart from the common law should be reconsidered.

The defense of duress is appropriate when considering some offenses which have the death of another as an element. For example, if the defendant is compelled, at the threat of the loss of his or a member of his family's life, to participate in a felony that escalates into a felony murder and he had no direct part in the murder, the defense of duress should logically be available to the defendant. It is not under the substitute version. Whether a murder occurred or not during the commission of the felony, in the example above, had no bearing on the nature of the compelled defendant's involvement. Therefore, it should have no bearing on whether or not the defense of duress is available to the defendant. If no murder had occurred during the felony, the compelled defendant would have the defense of duress available to him. If a murder is committed, the compelled defendant, through no change by him in his role, suddenly is deprived of the defense. There is no logical explanation for this difference.

Under present Ohio law a person involved in a felony-murder who did not do the actual killing can only be prosecuted and punished as the killer if he is found to have conspired with the killer to commit the felony

¹¹ *Id.*

¹² MODEL PENAL CODE § 2.09 (Proposed Official Draft 1962) [hereinafter referred to as M.P.C. (P.O.D.)].

¹³ PROP. OHIO CRIM. CODE § 2901.32(A) (as amended in SUB. H.B. NO. 511).

which results in a homicide.¹⁴ Consequently, under present Ohio law a defendant, who by duress was forced to drive the get-away car in a robbery which resulted in a killing, can escape prosecution for the murder because his duress would negate the conspiracy. However, under the substitute version of the defense, such a defendant could not escape prosecution by pleading duress.

Even in the situations where a compelled defendant kills an innocent victim, duress should perhaps be considered as a mitigating factor. The defendant did not originate the killing in his mind, nor did he want to follow through with it. However, because his life would be taken if he did not kill, he chose to kill. If first degree murder is charged, duress should be accepted as a factor sufficient to reduce the charge to manslaughter. Yet there appears to be no room for mitigation in the substitute version. Perhaps there should be.¹⁵

Finally, the last sentence of both the original and substitute versions eliminates the common law presumption that a wife who commits a crime in the presence of her husband did so on the command of her husband.¹⁶

B. *Necessity*

The original proposal:

Sec. 2901.32. (B) It is an affirmative defense to a criminal charge that the actor committed the offense in the reasonable belief that it was necessary to avoid a public or private injury greater than the injury sought to be prevented by the section defining the offense charged.¹⁷

The substitute proposal:

Sec. 2901.32. (B) It is an affirmative defense to a criminal charge other than a charge of which the death of another is an element, that the

¹⁴ *State v. Doty*, 94 Ohio St. 258, 113 N.E. 811 (1916); *State v. Palfy*, 11 Ohio App. 2d 142, 229 N.E.2d 76 (1967).

¹⁵ Under the original version of PROP. OHIO CRIM. CODE § 2903.03(A) (the manslaughter section), duress might have proved to be a factor sufficient to reduce a first degree murder charge to manslaughter.

Original § 2903.03(A):

No person, while under extreme emotional stress for which there is reasonable explanation or excuse, shall knowingly cause the death of another. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the offender's situation at the time of the offense, under circumstances as he believed them to be.

Such a possibility would depend on the definition of the word "knowingly." Although this possibility may still exist under the substitute version of § 2903.03(A), PROP. OHIO CRIM. CODE § 2903.03(A) (as amended in SUB. H.B. NO. 511), it is even less certain than under the original version.

Substitute § 2903.03(A):

No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

¹⁶ *Commonwealth v. Adams*, 186 Mass. 101, 71 N.E. 78 (1904).

¹⁷ PROP. OHIO CRIM. CODE § 2901.32(B).

actor committed the offense in the reasonable belief that it was necessary to avoid a public or private injury greater than the injury sought to be prevented by the section defining the offense charged.¹⁸

The defense of necessity arises in situations where an actor finds himself in the position of having to make a choice between two acts, both of which will result in harm to society, and voluntarily chooses one of the acts in order to avoid the harm incident to the other. The common law recognizes the defense and makes it available to the actor if he chooses the less harmful act in order to avoid the greater harm.¹⁹ However, the common law found no place for the defense when the actor's choice resulted in a homicide.²⁰

In its original form,²¹ the proposed defense of necessity would modify the common law by making the defense available in all cases including homicide. However, the substitute version reinserts the common law idea that any charge "of which the death of another is an element,"²² cannot be met with the defense of necessity. Therefore, the substitute version, as was the case with the substitute version of the defense of duress, is basically a codification of the common law.

This return to the common law may not be wise. Allowing the defense of necessity to a defendant who committed an offense "in the reasonable belief that it was necessary to avoid a public or private injury greater than the injury"²³ of the offense is a standard consistent with the belief that preservation of life is the supreme value—even in situations where the defendant commits an offense that takes life. For example, the defendant whose act takes one life which results in the saving of many lives is an appropriate candidate for the defense of necessity, especially when the defendant had a reasonable belief that failure to take the one life would result in the loss of many lives. This is not to say, however, that the defendant who takes another's life to save his own has acted in a reasonable belief that his act was necessary to avoid a greater public or private injury. The proposed defense of necessity as formulated in the original version would allow the defense in the first example but not the second. On the other hand the substitute version would allow the defense in neither situation—a result which has little or no justification.

If the legislature should decide that the original version is unacceptable, then as was suggested in the discussion on the defense of duress, the legislature should at least give some thought to including the concept of

¹⁸ PROP. OHIO CRIM. CODE § 2901.32(B) (as amended in SUB. H.B. NO. 511).

¹⁹ See *United States v. Ashton*, 24 F. Cas. 873 (No. 14,470) (C.C. Mass. 1834).

²⁰ *United States v. Holmes*, 26 F. Cas. 360 (No. 15,383) (C.C. Pa. 1842); *Queen v. Dudley and Stephens*, 14 Q.B.D. 273, 15 Cox Crim. Cas. 624 (1884).

²¹ PROP. OHIO CRIM. CODE § 2901.32(B).

²² PROP. OHIO CRIM. CODE § 2901.32(B) (as amended in SUB. H.B. NO. 511).

²³ PROP. OHIO CRIM. CODE § 2901.32(B).

necessity as a mitigating factor in those cases where the actor's taking of life resulted in the saving of more lives.

Additionally, it may be worth conjecturing whether the defense of necessity in its original or substitute version is viable at all. By allowing a defendant to escape prosecution if he can prove that he committed the offense charged in the reasonable belief that committing the crime was necessary to avoid a public or private injury greater than the one caused, the defense of necessity appears to be fostering a policy which encourages individuals to substitute their judgment for that of the legislature. This could have grave consequences on the well-being of the public peace and for the defendant, especially if a reasonable jury does not find that there was a reasonable belief. For example, a person may earnestly believe that burning draft records is a reasonable act necessary to stop what he perceives to be a greater public injury, the Vietnam war. Because of the existence of the defense of necessity, the person burns draft records believing he cannot be successfully prosecuted for doing it. Similarly, a person may believe it is reasonable in preventing the decline and decay of public morals, to destroy a movie house which shows X-rated films, and knowing of the defense of necessity is fearless of prosecution and goes out to burn such a movie house.

C. *Obedience to Military Orders*

The original proposal:

Sec. 2901.32. (C) It is an affirmative defense to a criminal charge that the actor, in engaging in the conduct constituting the offense, did no more than execute an order of his superior in the armed forces, which order the actor did not know to be unlawful.²⁴

The substitute proposal is identical to the original.²⁵

The proposed defense of obedience to military orders reflects the belief that for the military to function successfully, lawful orders, or at least orders which the soldier "did not know to be unlawful," must be obeyed without the fear of criminal prosecution.

Under present Ohio law, military personnel in the Ohio National Guard are subject to punishment for the willful disobedience of lawful orders of superior commissioned officers.²⁶ According to present Ohio law, it appears that a soldier could be punished by civilian authorities if he obeyed an unlawful order which caused injury, even if he did not know the order was unlawful. On the other hand, if the soldier thought the order was unlawful, when it was not, and subsequently disobeyed it to avoid what he perceived to be certain civilian punishment, he would be

²⁴ PROP. OHIO CRIM. CODE § 2901.32(C).

²⁵ PROP. OHIO CRIM. CODE § 2901.32(C) (as amended in SUB. H.B. No. 511).

²⁶ OHIO REV. CODE ANN. § 5924.90(B) (Page Supp. 1970).

punished by the military because he disobeyed a lawful order. Consequently, in those instances where it is extremely difficult to determine whether or not an order is lawful or unlawful, the soldier is placed in the unpleasant dilemma of believing that he may be punished no matter what he does. This dilemma is greatly eliminated for the soldier under the proposal because he has to *know*, not just suspect, that the unlawful order that he obeys is unlawful before he can be punished in civilian courts for obeying the unlawful order.

It should be emphasized that under the proposal a soldier cannot be punished for obedience to just any unlawful order. He can be punished only for obedience to those unlawful orders he knows to be unlawful, which is not the equivalent of "has reason to know." This affirmative defense, therefore, is harder to rebut than the defense of necessity, which speaks of the defendant in terms of his "reasonable belief,"²⁷ or the defense of duress, which speaks of him in terms of "a person of ordinary resolution."²⁸ The question is therefore, what the individual soldier believes rather than what a reasonable soldier believes. It appears that the House of Representatives wishes to offer a higher degree of protection to citizens when they act as soldiers than when they act as mere citizens.

III. ENTRAPMENT

The original proposal:

Sec. 2901.33. (A) It is an affirmative defense to a criminal charge that the offense was incited by a public servant as defined in Section 2921.01 of the Revised Code, or person acting in cooperation with him, for the purpose of obtaining evidence to prosecute the offender.

(B) The defense described in division (A) of this section is not available if the public servant or person cooperating with him merely afforded the offender the opportunity or facility for committing the offense in furtherance of a criminal purpose originated by the offender, his accomplice, or person with whom he conspired to commit the offense.

(C) The defense described in division (A) of this section is not available when causing or threatening physical harm to a person other than the person perpetrating the entrapment is an element of the offense charged.²⁹

The substitute proposal:

Sec. 2901.33. (A) It is an affirmative defense to a criminal charge that both of the following apply:

(1) The offense was incited by a law enforcement officer or person acting in cooperation with him, using threats or persistent urging, for the purpose of obtaining evidence to prosecute the offender.

²⁷ PROP. OHIO CRIM. CODE § 2901.32(B) (as amended in SUB. H.B. NO. 511).

²⁸ PROP. OHIO CRIM. CODE § 2901.32(A) (as amended in SUB. H.B. NO. 511).

²⁹ PROP. OHIO CRIM. CODE § 2901.33.

(2) The offender had no disposition to commit the offense upon being afforded the opportunity or facility for its commission, and would not have committed the offense but for the threats or persistent urging of the person perpetrating the entrapment.

(B) The defense described in division (A) of this section is not available when causing or threatening physical harm to a person other than the person perpetrating the entrapment is an element of the offense charged.

(C) As used in this section, repeatedly affording an offender the opportunity or facility for committing an offense does not, in itself, constitute "persistent urging."³⁰

It is generally agreed that the defense of entrapment is a recent and strictly American doctrine.³¹ There has not been general agreement in American courts, however, on a definition of the defense of entrapment. The two major entrapment cases decided by the United States Supreme Court, *Sorrells v. United States*³² and *Sherman v. United States*,³³ split the court five to four on the matter of a definition. Mr. Chief Justice Hughes, writing the majority opinion in *Sorrells*, held that entrapment was available as a defense

when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.³⁴

This definition, followed by the majority in *Sherman*, creates two basic requirements before the defense of entrapment can be made out. First, the criminal act must have been conceived in the mind of and induced by the government. Second, the person who was induced to perform the criminal act must have been an innocent person who would not have been disposed to commit the act on his own.

In contrast to the majority opinion in *Sorrells*, the concurring opinion of Mr. Justice Roberts expresses a formulation that does not require the defendant to have had an innocent predisposition. This formulation, often referred to as the minority view, states: "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."³⁵ Similarly, the concurring opinion in *Sherman* formulated the defense along the same lines, with special emphasis on the official conduct rather than on the defendant's character.

³⁰ PROP. OHIO CRIM. CODE § 2901.33 (as amended in SUB. H.B. NO. 511).

³¹ Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245, 246 (1942).

³² 287 U.S. 435 (1932).

³³ 356 U.S. 369 (1958).

³⁴ 287 U.S. at 442.

³⁵ *Id.* at 454.

Thus, "[t]he crucial question . . . is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power."³⁶ Simply put, the primary factor under the minority view is the nature and extent of police conduct.

A survey of the few reported Ohio cases involving the defense of entrapment³⁷ indicates that Ohio is in the camp of the majority. An examination of the following language found in *State v. Good*,³⁸ a narcotics case, indicates how committed Ohio is to the majority view:

Where the crime committed is of such harmful character and the interests of the public are so deeply endangered, the criminal act should be punishable regardless of the state of mind of the actor, and the defense of entrapment should, under such circumstances, fall of its own weight.

. . . [W]here only the opportunity to commit a criminal act is afforded the defendant by the conduct of the informer, and the tendencies of the defendant clearly indicate that he intends to disregard injury to the public good and voluntarily accepts the opportunity afforded him to violate the law, particularly where the crime committed is one usually committed in secret and is of such a depraved character that the public must be protected, he should . . . stand the consequences of his act.³⁹

The *Good* court spoke in these terms despite the fact that a police informer, during the course of what the record indicated was aggressive and persistent urging, pulled a gun and threatened to kill the defendant if he did not sell the narcotics.⁴⁰ The absence of any critical comments about the aggressive and threatening nature of the police informant's conduct indicates that this particular Ohio court did not share the *Sorrells-Sherman* minority's concern with policing official conduct. The reason for the absence of critical comments about the police informer's conduct may be because the majorities in *Sorrells* and *Sherman*, which the *Good* court followed, were not particularly concerned with police conduct. The *Sorrells-Sherman* majority rested the entrapment defense on the policy ground that a legislative body which described an act as an offense (in *Sorrells* the legislative body was Congress and the act was the sale of liquor during prohibition) did not intend the act to be an offense when committed at the instigation of a government official.⁴¹ In contrast, the minorities in *Sorrells* and *Sherman* rested the entrapment defense on the policy ground that the function of law enforcement officials is the detection of crime, not the

³⁶ 356 U.S. at 382.

³⁷ *State v. Good*, 110 Ohio App. 415, 165 N.E.2d 28 (1965); *Langdon v. Board of Liquor Control*, 98 Ohio App. 535, 130 N.E.2d 430 (1954); *State v. Griffiths*, 27 Ohio Op. 307 (C.P. 1943).

³⁸ 110 Ohio App. 415, 165 N.E.2d 28 (1965).

³⁹ *Id.* at 430, 165 N.E.2d at 38.

⁴⁰ *Id.* at 435, 165 N.E.2d at 41.

⁴¹ *Sorrells v. United States*, 287 U.S. 435, 445-48 (1932).

creation of it, and that the only way to deter official instigation of criminal acts is to deny the government the conviction of those officially inspired to act criminally. Justice Roberts, writing for the minority in *Sorrells*, emphasized this when he stated:

[C]ourts must be closed in the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and guilty defendant, has any place in the enforcement of this overruling principle of public policy.⁴²

In its original form,⁴³ the proposed entrapment defense would have reflected a change in Ohio law by following the minority formulation of the defense with its emphasis on policing the conduct of law enforcement officers. This is especially evident when considering the comments of the drafters of the original proposal: "[The proposed defense of entrapment] is based . . . on public policy which forbids the creation of crime by those charged with preventing it, and a recognition that the only effective way to deter the practice is to frustrate conviction of entrapped offenders."⁴⁴ The original proposal would have allowed the defense when the criminal act was "incited" by government action but would have withdrawn the defense when the government "merely afforded . . . the opportunity or facility" for its commission *and* the "criminal purpose originated" in the mind of the defendant.⁴⁵ Additionally, the defense would not have been available if the defendant caused or threatened physical harm to someone other than the entrapper.

The essence of the original proposal would appear to be that the defense is available if the defendant can show he would not have committed the act "but for" the inducement of government action. Corroboration of this belief can be found in the drafters' statement: "It is [our] . . . intention that divisions (A) and (B) together permit the defense of entrapment only when the offense would probably not have been committed except for the urging of the governmental official involved."⁴⁶

The substitute version of the defense⁴⁷ is similar to the original proposal in only one way: The defense is not available to the defendant whose act caused or threatened physical harm to a person other than the entrapper. With that feature the similarity abruptly halts and a codification of the defense according to the *Sorrells* majority begins. The substitute version allows the defense if the defendant can establish that he did the act because he was "incited" by the use of "threats or persistent

⁴² *Id.* at 459.

⁴³ PROP. OHIO CRIM. CODE § 2901.33.

⁴⁴ PROP. OHIO CRIM. CODE § 2901.33, Committee Comments at 51.

⁴⁵ PROP. OHIO CRIM. CODE § 2901.33.

⁴⁶ PROP. OHIO CRIM. CODE § 2901.33, Committee Comments at 52.

⁴⁷ PROP. OHIO CRIM. CODE § 2901.33 (as amended in SUB. H.B. NO. 511).

urging" on the part of the government and can further establish that he had *no disposition* to commit the act upon being afforded the opportunity.⁴⁸ To further emphasize the difficulty of establishing the defense under the substitute version, consider the version's statement that "repeatedly affording an offender the opportunity or facility for committing an offense does not, in itself, constitute persistent urging."⁴⁹ The original version proposed that if the offense were "incited" by official action, a defense could be made out. Incite is defined as to arouse to action, stir up, spur on or urge on.⁵⁰ Since the substitute version states that repeatedly affording an opportunity or facility does not, in itself, constitute persistent urging, it is probable that the substitute version also implicitly holds that repeatedly affording an opportunity for violation does not constitute incitement either, which it would under the original version.

The differences between the two versions are sharp. Under the original, the defense can be more easily made out than under the substitute. The fact that the original was conceived within the confines of a relatively apolitical atmosphere while the substitute was conceived with political considerations as an input, can probably account for the sharp differences. It is submitted here, also in the isolation of an apolitical atmosphere, that good politics does not necessarily make good law.

The question of when entrapment should be permitted as a defense is a difficult one which requires the balancing of competing values. On the one hand there is the value of the legitimate detection of crimes, while on the other there is the value of protecting the unwary innocent or unwary but tempting individual who has a tendency toward criminal activity and needs all the official help he can get to stay straight. The proper balancing of the two is the difficult task inherent in defining an entrapment defense. It is submitted here that the original version succeeded at the difficult task while the substitute version failed.

The original version would have permitted necessary police conduct which would detect those crimes which seldom have witnesses other than the direct participants, such as prostitution and the illegal sale of narcotics. Under the original version, the police could proposition a suspected prostitute or attempt to make a narcotics transaction so long as they "merely afforded the offender the opportunity or facility for committing the offense in furtherance of a criminal purpose originated by the offender. . . ."⁵¹ Although this structuring of the defense would not allow the prosecution of a young female runaway who needed money and had not considered prostituting herself to get it until propositioned by government action, such a structuring would allow the prosecution of a professional

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1142 (1961).

⁵¹ PROP. OHIO CRIM. CODE § 2901.33.

prostitute. The original version permitted the prosecution of those police-solicited offenders who originated the criminal purpose in their own minds, rather than having it planted there by police conduct. Police solicitation that goes beyond the mere affording of an opportunity or facility is also prohibited. Because of these factors, the original version supported legitimate police detection of crime and the rehabilitation of unwary innocents and unwary but temptable individuals who have criminal tendencies and need official help, not temptation, to straighten themselves out.

The substitute version is harsh, and if enacted, would effectively abolish the defense of entrapment in Ohio. It cannot be denied that there are those in our society who need corrective help, not crippling, officially-inspired temptation. The values of reforming and rehabilitating the criminally inclined and protecting the unwary innocent take second place in the substitute version to the prosecution of police created crime. By specifically stating that "repeatedly affording an . . . opportunity or facility . . . does not, in itself, constitute persistent urging,"⁵² and by specifically requiring that a necessary element of the defense be proof that the defendant "would not have committed the offense but for the threats or persistent urging,"⁵³ the substitute version effectively puts the defense out of reach of all but the purest. A defendant who had the disposition to do an act but was successfully controlling that disposition could not use the defense if government action weakened his control and prompted him to act criminally. Likewise, the defendant who had no predisposition to commit an offense but who, through the officially repeated affording of an opportunity developed a disposition and did commit the offense, would not have the defense available to him.

The function of the police is to detect, not encourage crime. As explained earlier, the detection of certain crimes does require a degree of police solicitation. The original version recognized this and allowed the legitimate detection of those crimes, while at the same time protecting unwary innocents and unwary but temptable misfits. However, the substitute version appears to recognize little else but the detection of crime, with the possible result that those police who are not well-trained and supervised may engage in the illegitimate creation of crime.

Finally, it is important to note that the original version of the entrapment defense, by focusing on police conduct as the important element in determining what constitutes entrapment, is not breaking new ground. Indeed, as pointed out by others, "the current [United States Supreme Court] majority [viewpoint] has expressly declined to disavow permanently [the minority] . . . viewpoint which focuses on the conduct of the

⁵² PROP. OHIO CRIM. CODE § 2901.33 (as amended in SUB. H.B. NO. 511).

⁵³ *Id.*

government."⁵⁴ Additionally, the same source notes⁵⁵ that the majority viewpoint itself spoke of the entrapment defense in terms of the "integrity of administration" of justice⁵⁶ and "objectionable police methods."⁵⁷ Furthermore, there has been a reassessment of the defense among the lower federal courts with emphasis on the fairness of government conduct,⁵⁸ suggesting that the strength of the majority view may be deteriorating to the point where police conduct will be the important element in determining whether entrapment occurred.

IV. INTOXICATION

The original proposal:

Sec. 2901.35. (A) It is an affirmative defense to a criminal charge based on a voluntary act, as opposed to an omission to act or a failure to meet a duty, that at the time the offense was committed, the actor was intoxicated to such an extent that he lacked sufficient mental capacity either to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law.

(B) It is an affirmative defense to a criminal charge based on an omission to act or a failure to meet a duty, as opposed to a voluntary act, that at the time the offense was committed, the actor was involuntarily intoxicated to such an extent that he lacked sufficient mental capacity to appreciate the criminal nature of his omission or failure, or that he was physically incapable of performing or meeting the required act or duty.

(C) As used in this section:

(1) "Intoxication" means a distortion or impairment of mental or physical capacities resulting from the introduction into the body of any substance, including without limitation alcohol or any medication, drug or abuse, or harmful intoxicant.

(2) "Voluntary intoxication" means any intoxication not defined as involuntary in division (C) (3) of this section, and includes without limitation any intoxication resulting from the actor's drug abuse.

(3) "Involuntary intoxication" means intoxication induced by force, coercion, duress, fraud, or mistake, and also means intoxication, other than intoxication resulting from drug abuse, which is grossly excessive considering the nature and amount of the intoxicating substance involved, and which is caused either by an abnormal bodily condition, or by an unexpected reaction with other substances in the body.⁵⁹

The substitute proposal:

Sec. 2901.35. (A) It is an affirmative defense to a criminal charge that, at the time the offense was committed, the actor was involuntarily

⁵⁴ *United States v. Morrison*, 348 F.2d 1003, 1004 (2d Cir. 1965).

⁵⁵ *Id.*

⁵⁶ *Sorrells v. United States*, 287 U.S. 435, 448-49 (1932).

⁵⁷ *Sherman v. United States*, 356 U.S. 369, 372 (1958).

⁵⁸ *Whiting v. United States*, 321 F.2d 72 (1st Cir.), *cert. denied*, 375 U.S. 884 (1963); *Accardi v. United States*, 257 F.2d 168 (5th Cir.), *cert. denied*, 358 U.S. 883 (1958).

⁵⁹ PROP. OHIO CRIM. CODE § 2901.35.

intoxicated to such an extent that he lacked sufficient capacity to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law.

(B) Involuntary intoxication is not a defense to any offense of which an element is operation of a motor vehicle, locomotive, watercraft, or aircraft while under the influence of alcohol or any drug of abuse, or of which an element is carrying or using any firearm or dangerous ordnance while under the influence of alcohol or any drug of abuse. Voluntary intoxication is not a defense of any offense.

(C) As used in this section:

(1) "Intoxication" means a distortion or impairment of mental or physical capacities resulting from the introduction into the body of any substance, including without limitation alcohol, any medication, or any drug of abuse.

(2) "Voluntary intoxication" means any intoxication not defined as involuntary in division (C) (3) of this section, and includes without limitation any intoxication resulting from the actor's drug abuse.

(3) "Involuntary intoxication" means intoxication induced by force, coercion, duress, fraud, or mistake, and also means intoxication, other than intoxication resulting from drug abuse, which is grossly excessive considering the nature and amount of the intoxicating substance involved, and which is caused either by an abnormal bodily condition, or by an unexpected reaction with other substances in the body.⁶⁰

The following, taken from the earliest reported English case denying intoxication as a defense, is the seed of the substantially similar general American rule that intoxication is not a defense to crime:

If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, . . . he shall not be privileged thereby.⁶¹

There are today, however, several significant exceptions to this general rule. The first exception is essentially a real defense and arises when the defendant can show he was too intoxicated to do the act charged.⁶² The second arises when the intoxication is proved to be involuntary either through mistake or fraud,⁶³ duress,⁶⁴ the use of prescribed medication,⁶⁵ or the normal use of an intoxicant combined with a weakened physical or mental condition.⁶⁶ The third exception resembles the defense of insanity. This exception arises when the defendant's chronic use of an intoxicant has reached the level of a disease such that the defendant's mind has

⁶⁰ PROP. OHIO CRIM. CODE § 2901.35 (as amended in SUB. H.B. NO. 511).

⁶¹ *Reninger v. Fogossa*, 1 Plowd. 1, 19; 75 Eng. Rep. 1, 31 (K.B. 1551).

⁶² *Jenkins v. State*, 93 Ga. 1, 18 S.E. 992 (1893).

⁶³ *State v. Alie*, 82 W. Va. 601, 96 S.E. 1011 (1918).

⁶⁴ *Burrows v. State*, 38 Ariz. 99, 297 P. 1029 (1931).

⁶⁵ *Perkins v. United States*, 228 F. 408 (4th Cir. 1915).

⁶⁶ *Leggett v. State*, 21 Tex. App. 382, 17 S.W. 159 (1886).

deteriorated to the point where he is in a near constant state of being incapable of distinguishing between right and wrong and is not responsible for his actions.⁶⁷ The last exception arises when the defendant, as a result of intoxication, lacked the requisite mental state to be found guilty of the crime charged where the crime requires a specific intent or knowledge—and may be considered more as a factor going to the mitigation of the charge rather than as a defense.⁶⁸

The distinction between the third and the last exceptions is that in the third the defense is complete because of a total lack of responsibility, while in the last exception the defense is only partial because the intoxication is temporary and goes only to negating those elements, if any, of the charged offense which concern a specific intent or knowledge. Thus, the last exception holds the defendant responsible for his actions and will not allow him to escape criminal sanction, although the degree of his responsibility, and therefore, the degree of his criminal sanction is determined by his intoxicated state. The third exception does not hold the defendant responsible and will permit the defendant to escape all criminal sanctions.

The present general rule in Ohio that was originally announced in 1843⁶⁹ is similar to the general rule put forth above and also contains the exceptions noted above. Paragraph number two of the syllabus in *Rucker v. State*⁷⁰ provides a useful statement of the defense of intoxication in Ohio:

Acute alcoholism or mental incapacity produced by voluntary intoxication existing temporarily at the time of the homicide is generally no excuse or justification for the crime. Proof of such intoxication, however, is competent and proper for the jury to consider as bearing upon the question of intent and premeditation, . . . or to show that no crime was committed.⁷¹

The original version proposed two differing applications for the defense. Which application is chosen would depend on whether the intoxication is involuntary, and on whether there has been a voluntary act or an omission to act or a failure to meet a duty. If the criminal charge is based on a voluntary act, the defense would be allowed if the defendant can demonstrate he was so intoxicated (either voluntarily or involuntarily) as to lack the "sufficient mental capacity either to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law."⁷² If the criminal charge is based on an omission to act or a failure to meet a duty, the defense would be allowed only when the defendant can demonstrate he was involuntarily intoxicated to the extent that "he

⁶⁷ *Maconnehey v. State*, 5 Ohio St. 77 (1855).

⁶⁸ *Cline v. State*, 43 Ohio St. 332, 1 N.E. 22 (1885).

⁶⁹ *Walton v. State*, 1 Ohio Dec. Repr. 32 (Sup. Ct. 1843).

⁷⁰ 119 Ohio St. 189, 162 N.E. 802 (1928).

⁷¹ *Id.* at 189-90, 162 N.E. at 802-803.

⁷² PROP. OHIO CRIM. CODE § 2901.35.

lacked sufficient mental capacity to appreciate the criminal nature of his omission or failure or that he was physically incapable of performing or meeting the required act or duty."⁷³ According to the drafters of the original proposal, the purpose for the differing applications "is to prevent a defense based on intoxication where the actor seeks to avoid a duty to act by voluntarily becoming intoxicated."⁷⁴

In its original form, the proposed defense defines intoxication beyond the traditional notion of alcoholic intoxication, to include intoxication as a result of other substances such as drugs of abuse and medication. Additionally, the original version provides definitions for voluntary intoxication and involuntary intoxication. The substitute version reflects substantially similar offerings. Further similarity between the two proposals, however, is not to be found. For example, the substitute version states: "Voluntary intoxication is not a defense to any offense."⁷⁵ This is at the opposite end of the pole from the original version which allowed it under certain conditions when there is an affirmative act. Furthermore, the substitute version recognizes only involuntary intoxication as a defense but does not recognize it as a defense to all offenses. It is a defense when the defendant was involuntarily intoxicated to the extent that he lacked "sufficient capacity to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law."⁷⁶ It is not a defense to any offense which has as an element the "operation of a motor vehicle, locomotive, watercraft, or aircraft while under the influence of [intoxicants] . . . , or [the] . . . carrying or using [of] any firearm or dangerous ordnance while under the influence of [intoxicants]. . . ."⁷⁷

It is submitted that while both the original and substitute versions have infirmities, the substitute version has more. The basic infirmity with the original version is that it is structured so broadly that any individual who can get so intoxicated that he no longer has the sufficient capacity to appreciate the criminal nature of his conduct can perform an act of rape or petty larceny and assert intoxication as a defense. In the instance where the individual who gets that intoxicated is a chronic alcoholic or drug addict and is unable to stop getting intoxicated before he starts, the defense is sensible. However, in the instance where the individual who gets that intoxicated is not a chronic alcoholic or drug addict and is able to stop getting intoxicated before he starts, the original proposal appears to make little sense, especially in light of recent federal court cases.

In *Robinson v. California*⁷⁸ the United States Supreme Court reversed

⁷³ *Id.*

⁷⁴ PROP. OHIO CRIM. CODE § 2901.35, Committee Comments at 56.

⁷⁵ PROP. OHIO CRIM. CODE § 2901.35 (as amended in SUB. H.B. NO. 511).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 370 U.S. 660 (1962).

a conviction for narcotics addiction asserting that addiction was a disease and the eighth and fourteenth amendments prohibited subjecting a narcotic addict to criminal punishment for being a narcotic addict. The Fourth Circuit case of *Driver v. Hinnant*,⁷⁹ suggests chronic alcoholism is also a disease, as does the District of Columbia Circuit case of *Easter v. District of Columbia*,⁸⁰ in addition to several medical authorities.⁸¹ Assuming a similarity between a narcotic addict and a chronic alcoholic, the result in *Robinson* should apply to a similar case involving a chronic alcoholic. Whether it does is questionable. The United States Supreme Court in *Powell v. Texas*,⁸² held that a chronic alcoholic could be punished for public intoxication. Although the case did not hold that a chronic alcoholic can be punished for his status as a chronic alcoholic, punishing him for public intoxication seems to represent the substantial equivalent. Nevertheless, it does appear that narcotic addicts and chronic alcoholics cannot be punished for simply being addicts and alcoholics. Because of *Powell* and *Watson v. United States*,⁸³ it seems that such individuals can be punished, however, for actions which result from their status as addicts or alcoholics.

An individual whose actions harm society should be incapacitated. However, individuals who cause harm as a result of a status over which they have no control should not be prosecuted and punished as criminals. In addition to being cruel and unusual punishment, such action seems to be a misapplication of rehabilitative remedies, if one assumes a prime goal of the criminal law is rehabilitation. The medically ill and diseased need the rehabilitating aid of physicians and not the debilitating effects of today's prisons. This is not to say that individuals who suffer from narcotic addiction and chronic alcoholism and cause harm as a result of their condition should not be incapacitated. It is only to say that they should not be tried as criminals but treated as ill persons and committed to a facility designed to restore their health.

To permit the use of the defense of intoxication as a means to prevent such individuals from being treated as criminals is sensible. These individuals never had the initial requisite mental state to stop the inflow of intoxicants in the first place, let alone the requisite mental state, once intoxicated, to appreciate the criminal nature of their conduct should their bodies perform an act that society considers criminal. However, the defense seems to grow meaningless when made available to the individual who had the

⁷⁹ 356 F.2d 761, 763-64 (4th Cir. 1966).

⁸⁰ 361 F.2d 50, 54 (D.C. Cir. 1966).

⁸¹ 2 R. CECIL and R. LOEB, A TEXTBOOK OF MEDICINE 1625 (10th ed. 1959); M. GUTTMACHER and H. WEIHOFEN, PSYCHIATRY AND THE LAW 318-22 (1st ed. 1952); E. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 41-44 (1960).

⁸² 392 U.S. 514 (1968).

⁸³ 439 F.2d 442 (D.C. Cir. 1970).

requisite mental state to stop taking the intoxicant before he got to the state where he finally lacked the sufficient mental capacity to conform his conduct to the law's requirements. To allow the defense of intoxication to one who was capable of remaining sober is the equivalent of excusing criminal conduct that results from irresponsible behavior.

This is not to say that a defendant who killed an individual while voluntarily intoxicated and is charged with first degree murder for the homicide cannot introduce the fact of intoxication to disprove the element of premeditation and thereby get the charge reduced. It is only to say that a defendant who killed an individual while voluntarily intoxicated cannot use that fact as a defense to the killing and thereby escape all punishment. It is submitted that the drafters of the original proposal are incorrect when they state that the original proposal "codifies and updates the Ohio rule that intoxication is a defense to a crime when it is of such a degree as to negate the culpable mental state required for commission of the offense."⁸⁴ Present Ohio law as set forth in *Rucker v. State*⁸⁵ and *Cline v. State*⁸⁶ does not hold that intoxication is a defense to such crimes, but only that intoxication can reduce the crime charged. If the drafters believe the word "updates" rebuts this criticism, then it is submitted that they should have used the phrase "what the [drafters] believe updates," rather than the word "updates" unmodified.

In comparison to the original version, the substitute version recognizes only involuntary intoxication as a defense, and then not under all circumstances. The basic criticism of the substitute version is that it defines involuntary intoxication as "intoxication induced by *force, coercion, duress, fraud, or mistake*,"⁸⁷ and yet it does not then recognize the defense as against every offense. On its face the situation is paradoxical. If an individual has the state of intoxication involuntarily forced upon him, and thereafter drives an automobile and is arrested, to prosecute him for drunken driving is the equivalent of prosecuting him for having forced upon him an intoxicating substance—an event the defendant could not stop or control. This result is unjustifiable by any standard of reason!

The substitute version also states that "voluntary intoxication is not a defense to any offense."⁸⁸ While this is simply a statement of what is the accepted general rule, the absence of any enunciation of the exceptions to the general rule cited earlier, and the absence of any of the judicially announced rules allowing the fact of intoxication to be used to reduce the criminal charge, cause one to believe that the substitute version of the de-

⁸⁴ PROP. OHIO CRIM. CODE § 2901.35, Committee Comments at 55.

⁸⁵ 119 Ohio St. 189, 162 N.E. 802 (1928).

⁸⁶ 43 Ohio St. 32, 1 N.E. 22 (1885).

⁸⁷ PROP. OHIO CRIM. CODE § 2901.35 (as amended in SUB. H.B. NO. 511) (emphasis supplied).

⁸⁸ *Id.*

fense means to disallow those exceptions and judicially announced rules. This is especially believable in light of what the substitute version has done with the defense of involuntary intoxication. If such an interpretation is correct, it is submitted here that only injustice would be served. A defendant who kills while so intoxicated that he does not know what he is doing, lacks the culpable mental state required for commission of capital murder. However, if the suggested interpretation is correct, the defendant could be charged with capital murder and be unable to use his intoxicated condition as a factor bearing on reducing the charge.

As an alternative to both the original and substitute proposals, the following is offered:

Sec. 2901.35 (A) Voluntary intoxication is not a defense to any offense. Whenever the offense charged has a requisite mental element, evidence of intoxication is admissible to show the absence of such mental element, or to show that no crime was committed.

(B) It is an affirmative defense to a criminal charge that, at the time the offense was committed, the actor was involuntarily intoxicated to such an extent that he lacked sufficient capacity to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law.

(C) As used in this section:

(1) "Intoxication" means a distortion or impairment of mental or physical capacities resulting from the introduction into the body of any substance, including without limitation alcohol or any medication, drug of abuse, or harmful intoxicant.

(2) "Voluntary intoxication" means any intoxication not defined as involuntary in division (C) (3) of this section, and includes without limitation any intoxication resulting from the actor's drug abuse.

(3) "Involuntary intoxication" means intoxication induced by force, coercion, duress, fraud, or mistake, and also means intoxication, other than intoxication resulting from drug abuse, which is grossly excessive considering the nature and amount of the intoxicating substance involved, and which is caused either by an abnormal bodily condition, or by an unexpected reaction with other substances in the body.

This suggested alternative is a combination of portions of both the original and substitute versions, and of portions of the present Ohio law as announced in *Cline v. State*.⁸⁹ It is believed this suggestion corrects the paradoxes of the substitute version and further corrects the overbreadth found in the original.

V. INSANITY

The original proposal:

Sec. 2901.36. (A) It is an affirmative defense to a criminal charge that, at the time the offense was committed, and as a result of the actor's mental disease or defect, he lacked sufficient mental capacity either to appreciate

⁸⁹ 43 Ohio St. 32, 1 N.E. 22 (1885).

the criminal nature of his conduct, or to conform his conduct to the requirements of law.

(B) As used in this section:

(1) "Mental disease" means any illness which impairs the capacity of a person to use self-control, judgment, and discretion in the conduct of his affairs and social relations, and includes without limitation any such illness resulting from or characterized by chronic alcoholism or drug dependence.

(2) "Mental defect" means any physiological condition which results in or is characterized by subnormal intellectual functioning, and includes without limitation mental retardation and impairment of intellectual functioning resulting from illness or injury.

(3) Neither mental disease nor mental defect includes any abnormality manifested solely by repeated criminal acts or other anti-social conduct.⁹⁰

The substitute proposal:

Sec. 2901.36. (A) It is an affirmative defense to a criminal charge that, at the time the offense was committed, and as a result of the actor's mental disease or mental defect, he lacked sufficient capacity either to appreciate the criminal nature of his conduct, or to conform his conduct to the requirements of law.

(B) As used in this section:

(1) "Mental disease" means any illness which impairs the capacity of a person to use self-control, judgment, and discretion in the conduct of his affairs and social relations.

(2) "Mental defect" means any physiological condition which results in or is characterized by subnormal intellectual functioning, and includes without limitation mental retardation and impairment of intellectual functioning resulting from illness or injury.

(3) Neither mental disease nor mental defect includes any abnormality manifested solely by repeated criminal acts.⁹¹

The defense of legal insanity has had several formulations since Daniel M'Naghten attempted to kill Robert Peel. The formulation in *M'Naghten's Case*⁹² contained two tests: Did the defendant (1) know what he was doing or (2) if he did, did he know it was wrong?

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know . . . [it] was wrong.⁹³

A second formulation⁹⁴ employed the two tests of the *M'Naghten* formula but added a third test, that of irresistible impulse. This formulation al-

⁹⁰ PROP. OHIO CRIM. CODE § 2901.36.

⁹¹ PROP. OHIO CRIM. CODE § 2901.36 (as amended in SUB. H.B. No. 511).

⁹² 8 Eng. Rep. 718 (K.B. 1843).

⁹³ *Id.* at 722.

⁹⁴ *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

lowed the defense when an offender's act resulted from his powerlessness to resist because of his mental state, even though he knew what he was doing and knew it was wrong. A third formulation was devised in *Durham v. United States*⁹⁵ and abandoned both of the above formulations. The rule in *Durham* simply held that a defendant had made out an insanity defense "if his unlawful act was the product of mental disease or mental defect."⁹⁶ A fourth formulation appeared in the 1961 Third Circuit case of *United States v. Currens*.⁹⁷ The *Currens* formulation allowed a defendant the defense of insanity if he, at the time he committed the unlawful act and "as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."⁹⁸

The Ohio formulation of the insanity defense is found in *State v. Staten*,⁹⁹ and reflects the two tests of the M'Naghten formula plus irresistible impulse.

In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.¹⁰⁰

This formulation by the Ohio Supreme Court reflects much similarity with the Model Penal Code's formulation.¹⁰¹

The original insanity defense proposal would have codified the formulation expressed in *State v. Staten*, with one exception: the defendant would not have to prove his insanity by a preponderance of the evidence. In addition to codifying *Staten*, the original proposal would define mental defect and mental disease. For purposes of later discussion it is useful to note that the definition of mental disease not only meant any illness which impaired the capacity of a person to use self-control, but specifically included, "without limitation any such illness resulting from or characterized by chronic alcoholism or drug dependence."¹⁰²

Unlike the other affirmative defenses discussed here, there is complete similarity between the original and substitute versions of the insanity defense with the exception of two points. First, by virtue of proposed substitute § 2901.05,¹⁰³ the requirement of *Staten* that the defendant must

⁹⁵ 214 F.2d 862 (D.C. Cir. 1954).

⁹⁶ *Id.* at 874-75.

⁹⁷ 290 F.2d 751 (3d Cir. 1961).

⁹⁸ *Id.* at 774.

⁹⁹ 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

¹⁰⁰ *Id.* at 21, 247 N.E.2d at 299 (footnotes omitted).

¹⁰¹ M.P.C. § 4.01 (P.O.D.).

¹⁰² PROP. OHIO CRIM. CODE § 2901.36.

¹⁰³ PROP. OHIO CRIM. CODE § 2901.05 (as amended in SUB. H.B. NO. 511).

prove insanity by a preponderance of the evidence is reestablished in the substitute version, whereas it is not in the original. Second, that element of the definition of mental disease cited earlier, which relates to "illness resulting from or characterized by chronic alcoholism or drug dependence," is deleted in the substitute proposal. The major criticism of the substitute version centers on this deletion.

The only probable conclusion that can be drawn from the removing of that portion of the definition of mental disease that relates to chronic alcoholism or drug dependence, is that the House Judiciary Committee does not consider chronic alcoholism or drug dependence to be mental diseases. If this conclusion is correct, it is suggested that the deletion is unwise, especially in light of the substitute version of the defense of intoxication. A defendant who committed an unlawful act while suffering from the extreme symptoms of chronic alcoholism or drug dependence cannot use the defense of intoxication as set forth in the substitute version of that defense. If the contraction of the definition of mental disease indicates that chronic alcoholism or drug dependence cannot result in insanity, which would be contrary to present Ohio law,¹⁰⁴ then the defendant who commits a criminal act while suffering from the extreme affects of chronic alcoholism or drug dependence will have no defense available to him because of his sickness and will be prosecuted in the same manner as a defendant who commits the same act but who is not suffering from chronic alcoholism or drug dependence.

If this is so, it is the equivalent of stating that the proposed substituted code considers those who commit unlawful acts while suffering from the extreme symptoms of chronic alcoholism or drug dependence as appropriate candidates for criminal sanctions rather than as appropriate candidates for medical aid. If the above assumptions and reasoning are correct, there can be no justifiable policy grounds to support the contraction of the definition of mental disease; and it must be expanded to reflect the original proposal's definition.

Aside from the matter of the definition of mental disease found in the substitute proposal, both the substitute and original proposals of the insanity defense appear to be examples of reasonable legislative action. They represent a recognition that a defendant who did not know what he was doing or could not control what he was doing, even if he knew it were wrong, should not be subjected to the law's criminal sanctions. Which is to say, they represent a recognition that to apply criminal sanctions to a mentally ill defendant would neither deter nor rehabilitate that defendant and thereby not assure that he would not commit criminal acts in the future.¹⁰⁵

¹⁰⁴ *Rucker v. State*, 119 Ohio St. 189, 162 N.E. 802 (1928).

¹⁰⁵ It is useful to note that the Proposed Code, in both its original and substitute ver-

VI. CONCLUSION

A final observation on these four affirmative defenses must be directed at the burden and degree of proof required by the defendant to successfully assert them. That section of the Proposed Criminal Code, in both its original and substitute versions dealing with this matter, is presented below.

The original proposal:

Sec. 2901.05. (A) Every person accused of an offense is presumed innocent until proved guilty.

(B) No person shall be convicted of an offense unless his guilt is proved beyond a reasonable doubt. This division does not require the prosecution to rebut an affirmative defense until the accused adduces evidence supporting such defense.

(C) "Reasonable doubt" is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt.

(D) An "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.¹⁰⁸

The substitute proposal:

Sec. 2901.05. (A) Every person accused of an offense is presumed innocent until proved guilty.

(B) No person shall be convicted of an offense unless his guilt is proved beyond a reasonable doubt, and the burden of proof is upon the prosecution.

(C) Except for the defenses of intoxication and insanity contained in sections 2901.35 and 2901.36 of the Revised Code, a defense or affirmative defense to a criminal charge is established if it creates a reasonable doubt as to the guilt of the accused. The defenses of intoxication and insanity are established by a preponderance of the evidence. The burden of going forward with the evidence of an affirmative defense is upon the accused.

(D) As used in this section, "reasonable doubt" is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt.

sions, does not affect the present mandatory commitment of a defendant acquitted on the sole ground of his insanity. OHIO REV. CODE ANN. § 2945.39 (Page Supp. 1970).

¹⁰⁸ PROP. OHIO CRIM. CODE § 2901.05.

(E) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.¹⁰⁷

Under present Ohio law¹⁰⁸ a defendant is presumed innocent of the crime charged until the state can prove him guilty beyond reasonable doubt. In both the original and substitute versions of the proposed section, this requirement will remain the law. Differences between the two versions occur, however, when considering the degree of proof required to assert particular affirmative defenses.

Under the original version, the defendant must only "adduce evidence supporting" whatever affirmative defense he asserts in order to initially establish the defense. The drafters of the original version had this to say about their proposal:

. . . If the evidence adduced by the defendant to establish his defense is sufficient to cast a reasonable doubt on the question of his guilt, then he should be acquitted, regardless of whether he has proved the substance of his defense by a preponderance of evidence, or by clear and convincing evidence, or beyond a reasonable doubt. In other words, it should remain the prosecution's part to establish the defendant's guilt beyond a reasonable doubt, and the part of the defense to cast a reasonable doubt on the prosecution's case, if it can.¹⁰⁹

The drafters of the substitute version were in general agreement with this statement. However, they carved out two major exceptions: to wit, the defenses of intoxication and insanity. These, they said, must be proved by a preponderance of the evidence. Why the exceptions? It may be simply that since present Ohio law states that intoxication, at least voluntary,¹¹⁰ and insanity,¹¹¹ must be proved by a preponderance of the evidence, they shall continue to be proved by a preponderance of the evidence. The logic of requiring the state to prove guilt beyond reasonable doubt seems inconsistent with the degree of proof required of the defendant pleading either insanity or intoxication as a defense under the substitute version. How can guilt of first degree murder be established by the state beyond a reasonable doubt when a defendant adduces evidence which creates a reasonable doubt as to his sanity, which is the equivalent of creating a reasonable doubt as to the necessary mental element of the crime of first degree murder?

¹⁰⁷ PROP. OHIO CRIM. CODE § 2901.05 (as amended in SUB. H.B. NO. 511).

¹⁰⁸ OHIO REV. CODE ANN. § 2945.04 (Page 1954).

¹⁰⁹ PROP. OHIO CRIM. CODE § 2901.05, Committee Comments at 29.

¹¹⁰ *Long v. State*, 109 Ohio St. 77, 141 N.E. 691 (1923).

¹¹¹ *State v. Staten*, 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

Although the United States Supreme Court in *Leland v. Oregon*¹¹² apparently found no logical inconsistency in requiring the state to prove first degree murder beyond reasonable doubt, while at the same time upholding a state statute requiring a defendant to prove insanity beyond reasonable doubt, other states have decided that an accused need only raise the insanity defense by adducing some evidence which the state must rebut beyond a reasonable doubt.¹¹³

In the recent case of *In re Winship*¹¹⁴ the United States Supreme Court itself has now cast some doubt as to whether *Leland* is still effective. Mr. Justice Brennan, writing for the Court, stated most strongly:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime* with which he is charged.¹¹⁵

Mr. Justice Brennan arrived at this statement after quoting¹¹⁶ from the dissenting opinion of Mr. Justice Frankfurter in *Leland*. Mr. Justice Frankfurter said in *Leland*:

It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."¹¹⁷

Given the logical inconsistency inherent in the substitute version's requirement that the state must prove guilt beyond reasonable doubt while the defendant must prove insanity or intoxication by a preponderance of the evidence, and the serious doubt raised by *Winship* whether such a formulation would weather a constitutional challenge, and elimination of the special treatment afforded intoxication and insanity by the substitute version should be undertaken, and both should be established as affirmative defenses to a criminal charge if evidence of them creates a reasonable doubt as to the guilt of the defendant.

Richard Pfeiffer

¹¹² 343 U.S. 790 (1952).

¹¹³ ILL. ANN. STAT. ch. 38, § 3-2 (Smith-Hurd 1964).

¹¹⁴ 397 U.S. 358 (1970).

¹¹⁵ *Id.* at 364 (emphasis supplied).

¹¹⁶ *Id.* at 362.

¹¹⁷ 343 U.S. at 802-03 (Mr. Justice Frankfurter, dissenting).